SUPREME COURT, U.S.
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No. 03-1064

IN THE

Supreme Court of the United States

NORMA NESBIT, PETITIONER

v.

GEARS UNLIMITED, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN L. SENFT
Counsel of Record
BARLEY, SNYDER, SENFT & COHEN, LLC
100 East Market Street
York, PA 17401
(717) 846-8888
Attorneys for Respondent Gears Unlimited, Inc.

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

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REASONS FOR DENIAL OF THE WRIT

In this matter, Petitioner Norma Nesbit raises concerns with respect to the jurisdictional analysis which a Court should conduct to determine coverage under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. ("Title VII"). Respondent Gears Unlimited, Inc. originally filed a Motion To Dismiss this action pursuant to Federal Rule 12(b)(1) before the United States District Court for the Middle District of Pennsylvania, following discovery related to the issue of whether Respondent employed 15 or more individuals during the relevant period, as is necessary to invoke coverage under Title VII. See 42 U.S.C. §2000e(a) (an "employer" is "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year"). The U.S. District Court granted the Motion to Dismiss after a review of the factual record presented by the parties. See Petition, Appendix B.

On appeal, the United States Court of Appeals for the Third Circuit held that the U.S. District Court should have reviewed the Motion as a request for summary judgment under Federal Rule 56 rather than under Rule 12(b)(1). Regardless, the Third Circuit found that under the summary judgment standard and the factual record below, the action was properly dismissed. In reaching this conclusion, the Court adopted a standard for determining the circumstances under which the employees of two separate entities could be combined for the purposes of forming a "single employer" with sufficient employees to satisfy the Title VII threshold.

The questions presented and arguments raised in the Petition are not a model of clarity, and it is not entirely clear whether Petitioner seeks to raise the Rule 12(b)(1) issue, the single employer issue, or both. Out of an abundance of caution, Respondent will address both issues.

I. PETITIONER'S BRIEF MISSTATES THE FACTUAL RECORD

Initially, at pages 3-8 of her Brief, Petitioner includes a factual recitation which is wholly unsupported by the record before the U.S. District Court. It is especially noteworthy that while Petitioner's Brief cites generally to witness depositions, there are no page citations or other specific references to the record in ostensible support of the "factual" contentions Petitioner makes. Respondent does not consider it necessary to correct the numerous factual inaccuracies set forth at pages 3-8 of Petitioner's Brief, and would simply rely upon the factual recitations set forth in the U.S. District Court's Opinion (see Appendix B, pp. 44-48), all of which are abundantly supported by the deposition testimony and documentary evidence produced through discovery.

II. THE THIRD CIRCUIT ANALYZED THIS MATTER UNDER RULE 56, A STANDARD WHICH IS MORE FAVORABLE TO PETITIONER

As noted above, Respondent originally presented a Motion requesting the dismissal of this action pursuant to Federal Rule 12(b)(1), and the U.S. District Court analyzed it under that standard. The Third Circuit determined that the Motion should have been reviewed under the summary judgment standards set forth in Federal Rule 56. The Third Circuit's determination in this regard was actually more favorable from Petitioner's viewpoint. See Kehr Packages v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3rd Cir. 1991), cert. denied 501 U.S. 1222 (1991); Mortensen v. First Federal Savings and Loan Association, 549 F.2d 884, 890-91 (3rd Cir. 1977); Gould Electronics v. United States, 220 F.3d 169, 177-78 (3rd Cir. 2000). As such, there is no logical reason for Petitioner to complain about the Third Circuit's decision to analyze the case within the framework established by Rule 56.

Ultimately, the Third Circuit found that there was no dispute as to a material fact and that Respondent was entitled to judgment as a matter of law under Rule 56. At no point in these proceedings has Petitioner ever contended that she was denied a full and fair opportunity to develop a factual record, and indeed, the findings made by the Third Circuit and the U.S. District Court are undisputed and based largely upon Petitioner's own deposition testimony. As such, even if this Court were to find that the Third Circuit should have reviewed this matter under Rule 12(b)(1)

12(b)(1) rather than Rule 56, it would not alter the ultimate result.

III. BOTH THE U.S. DISTRICT COURT AND THE THIRD CIRCUIT CORRECTLY DETERMINED THAT THE "SINGLE EMPLOYER" DOCTRINE WAS NOT APPLICABLE TO THIS CASE.

As noted above, both the U.S. District Court and the Third Circuit considered the issue of whether Respondent and Winters Performance Products, an entity in which Respondent's President possesses an ownership interest, could be combined as a "single employer", thereby allowing the employees of both entities to count toward the jurisdictional threshold. The U.S. District Court analyzed this argument under NLRB v. Browning-Ferris Industries of Pennsylvania, Inc., 691 F.2d 1117 (3rd Cir. 1982), which espouses the consideration of the following factors: (a) integration of operations; (b) centralized control of labor relations; (c) common management; and (d) common ownership. Under this standard, the U.S. District Court found that there was insufficient evidence to hold that Respondent and Winters Performance Products could be considered a single employer.

The Third Circuit, in an issue of first impression, rejected the Browning-Ferris rule and adopted a standard similar to that used by the Seventh Circuit in Papa v. Katy Industries, Inc., 166 F.3d 937 (7th Cir. 1997). In so doing, the Third Circuit found that a single employer relationship would exist: (a) when a company had split itself into two entities for the purpose of evading Title VII coverage; (b) where a parent

company directed the subsidiary to perform the allegedly discriminatory act in question; or (c) where the two entities' affairs were so interconnected that they collectively caused the alleged discriminatory practice. See Appendix A, p. 31. The Court concluded that there was no factual basis to conclude that any of these factors were present with respect to the relationship between Respondent and Winters Performance Products.

As noted above, the U.S. District Court analyzed the single employer issue under the Browning-Ferris standard, which fairly could be characterized as a comparatively employee-friendly approach. Even if this Court were to find that the standard adopted by the Third Circuit was incorrect, the fact would remain that the U.S. District Court had already reviewed Petitioner's argument under the more lenient Browning-Ferris test. As such, the ultimate outcome would not be altered.

IV. THE ISSUES PRESENTED BY THIS PETITION ARE NOT OF CRUCIAL IMPORTANCE

Finally, Petitioner suggests that the Third Circuit's Opinion has "far-reaching implications" and that the issues presented in the Petition are "recurrent and important." Respondent would respectfully suggest that Petitioner is grossly overstating this significance of the Third Circuit's ruling in the hope of meeting the demanding standard set forth in Rule 10 of this Court's Rules. In this regard, Respondent would assert: (a) that it is a rare circumstance in which the single employer doctrine revives an otherwise invalid

Title VII claim; (b) that an analysis of the 15-employee threshold under Title VII will virtually always result in the same outcome regardless of whether the issue is reviewed under Rule 12(b)(1) or Rule 56; (c) that there is no serious disagreement among the Circuit Courts concerning these issues, only subtle differences of emphasis; and (d) as the modes of analysis utilized by the U.S. District Court and the Third Circuit clearly reflect, the action was properly dismissed regardless of the legal standard employed. As such, the Third Circuit's Opinion raises no significant issues of law which warrant this Court's review.

CONCLUSION

For the reasons set forth herein, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

John L. Senft
Counsel of Record
Barley, Snyder, Senft & Cohen, LLC
100 East Market Street
York, PA 17401
(717) 846-8888
Attorneys for Respondent Gears Unlimited, Inc.